(8)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

BRIEF OF PETITIONER

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QUESTION PRESENTED

I. DOES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRE POLICE OFFICERS TO INFORM MOTORISTS, LAWFULLY STOPPED FOR TRAFFIC VIOLATIONS, THAT THE LEGAL DETENTION HAS CONCLUDED BEFORE ANY SUBSEQUENT INTERROGATION OR SEARCH WILL BE FOUND TO BE CONSENSUAL?

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The Decision of the Court of Appeals for Montgomery County, Ohio Second Appellate District, Case No. 14074, was entered on April 15, 1994, and is reproduced at App. 15-23 of the petition for Certiorari. It is unreported.

The Decision of the Common Pleas Court of Montgomery County, Ohio was filed on March 8, 1993 and is reproduced at App. 24-25 in the Petition for Certiorari. It is unreported.

JURISDICTION

The decision of the Ohio Supreme Court was entered on September 6, 1995. The petition for certiorari was filed on December 5, 1995. Certiorari was granted On March 4, 1995. Jurisdiction is invoked pursuant to 28 USC Sec. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment To The United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On December 18, 1992, Robert D. Robinette was charged by indictment in Common Pleas Court in Montgomery County, Ohio with one count of drug abuse, a felony of the fourth degree. His motion to suppress was overruled. He preserved his right to appeal by entering a plea of no contest. On appeal, the Court of Appeals for Montgomery County reversed. The Ohio Supreme Court affirmed the Court of Appeals. This Court granted Certiorari on March 4, 1996.

On August 3, 1992, Robert D. Robinette was stopped for speeding in a construction zone on Interstate 70, just outside of Dayton, Ohio, after Deputy Roger Newsome of the Montgomery County Sheriff's Office clocked him driving at 69 miles per hour in a posted 45 mile per hour zone. (Joint App., 10-11) Robinette, who was traveling back from a weekend in Chicago with a passenger, was 38 years old, possessed a bachelor of science degree in botany and lived in Montgomery County. (Joint App. 33, Joint Ex. A, Joint App. 9) Newsome asked Robinette to stand in front of his cruiser while he checked to see if Robinette's driver's license and registration were valid. (Joint App. 12-13, 25-26) Before returning

Robinette's license and registration, Newsome turned on a stationary videocamera inside of his cruiser and taped the rest of his exchange. (Joint App. 18-19, Joint Ex. A, Joint App. 9) This videotape was admitted into evidence at the suppression hearing. (Joint App. 9, Joint Ex. A)

In pertinent part, the conversation between Robinette and Newsome as reflected by the videotape was as follows:

> Officer Newsome: What do you do for a living?
>
> Mr. Robinette: I work for International Paper.
>
> Officer Newsome: Okay.
>
> Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Mr. Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.
>
> Mr. Robinette: Yeah (Remainder inaudible.)
>
> Officer Newsome: One question before you get gone; are you carrying any illegal contraband in your car?

(Mr. Robinette shakes head negatively)

Officer Newsome: Any weapons of any kind, drugs, anything like that?

(Mr. Robinette shakes head negatively)

Officer Newsome: Nothing like that? Okay.

Is all the luggage in there both yours and his?

(Mr. Robinette nods head)

Officer Newsome: All of it? Okay.

(Mr. Robinette nods head)

Officer Newsome: Would you mind if I search your car? Make sure there's nothing in there?

Mr. Robinette: No, go ahead.

Officer Newsome: Wouldn't have problem with it?

Mr. Robinette: No. (Joint Ex. A., Joint App. 9)

Newsome found a small amount of marijuana in Robinette's car, along with half of a tablet of "Ecstacy", a schedule I controlled substance the possession of which is a felony violation of Ohio Rev. Code 2925.11(A). (Joint App. 3, 14,)

Robinette testified at the hearing on the motion to suppress. On direct examination he testified that he believed that he was free to go as soon as Newsome returned his license. (Joint App. 26) When Newsome asked if he was carrying anything illegal in the car he

was surprised at the question. (Joint App. 26) When the officer asked if he could search the car, Robinette said that he was "still sort of shocked" and "just automatically" said yes. (Joint App. 26-27) On cross-examination Robinette reiterated that he believed that he was free to go when Newsome handed him his driver's license and registration. (Joint App. 29)

The trial court overruled Robinette's motion to suppress and found that the videotape demonstrated that Newsome had made it clear to Robinette that the traffic matter had been concluded before he asked him about contraband or weapons, that Newsome was not overbearing with Robinette and that Robinette's consent to search was voluntary and was not the product of duress or coercion.

The Court of Appeals reversed, holding that a reasonable person in Robinette's position would not have believed that he was free to go as long as the officer was asking investigative questions. Thus, Robinette's consent to the search was the product of an unlawful detention, and the contraband that was recovered was subject to suppression. One judge dissented, finding flawed the premise that a motorist could never voluntarily consent to a search of his car at the end of a traffic stop. The Ohio Supreme Court affirmed the Court of Appeals, and announced a bright-line test to be used in assessing the voluntariness of a motorist's consent to search that was obtained at the end of a traffic stop:

> The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining

> officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you are legally free to go" or words of similar import.

The question before this Court is whether a motorist's consent to a police officer to search his car, granted at the end of a lawful traffic stop, must be deemed in all cases to be involuntary unless the police officer has informed the motorist that the lawful detention has ended.

SUMMARY OF ARGUMENT

The Supreme Court of Ohio held below that the Fourth Amendment demands that an officer advise a motorist stopped for a traffic offense that he is free to go. Should the officer fail to do so, any subsequent cooperation by the motorist will be deemed to have been coerced, and any evidence found will be suppressed. This is the rule announced by the Ohio Supreme Court:

> The right, guaranteed by the federal and Ohio constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import. *State v. Robinette*, 73 Ohio St.3d 650 (1995).

In *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980), this Court held that a person is seized under the Fourth Amendment only when, in view of the totality of the circumstances, a reasonable person would not believe that he was free to go. Confronted with numerous opportunities to substitute a *per se* rule for the totality of the circumstances test, this Court has repeatedly held that it is only by consideration of the totality of the circumstances that the voluntariness of a citizen's cooperation can be determined. Furthermore, this Court has repeatedly held that warnings that a citizen need not remain or need not cooperate are not necessary to a finding of voluntary cooperation. Despite this clear precedent, the Ohio Supreme Court found that cautionary warnings must be given at the end of a lawful traffic stop. However, this Court has continued to apply the totality of the circumstances test in the context of the Fourth Amendment because it is particularly suited to accounting and weighing all the factors peculiar to any kind of police-citizen encounter. Thus, it was error for the Ohio Supreme Court to replace the totality of the circumstances test with a bright line rule, and its judgement should be reversed.

ARGUMENT

A. Introduction.

The Ohio Supreme Court has drawn a bright line separating valid seizures from illegal detentions by holding that the Fourth Amendment requires a police officer

to inform the motorist that he is free to go at the conclusion of a valid traffic stop. If the officer fails to give this warning, the motorist's subsequent cooperation with the officer – either in answering questions or allowing a search of his vehicle – will be irrebuttably presumed to be involuntary and any evidence found must be suppressed. In drawing this bright line, the Ohio Supreme Court defied the principle, established in an unbroken line of cases from this Court, that whether a person has been seized for purposes of the Fourth Amendment and whether a citizen's cooperation with an officer is voluntary must in all cases be measured by the totality of the circumstances, and that the presence or absence of any one factor, including advisory warnings that one need not cooperate, is not sufficient to answer the question of whether the person was seized or consent was voluntary.

The unreasonableness of creating a bright line test is perfectly illustrated by the outcome in this case. Robert D. Robinette was a 38 year old college graduate who admitted that he knew he was free to go as soon as the officer returned his driver's license and gave him a warning about speeding. The officer videotaped his request for consent and Robinette's answers, as well as the entire search, and the videotape was admitted into evidence. The trial judge considered all of the circumstances and found that Robinette's consent was voluntary. Yet, despite Robinette's admission that he knew he was free to go and the evident absence of coercion, the Ohio Supreme Court held that Robinette's consent must be deemed to be

involuntary because the officer did not tell him that he was free to go. This Court has rejected every attempt to replace the totality of the circumstances test with a bright line rule, and there is nothing so peculiar about a traffic stop that demands replacing the totality of the circumstances test with a bright line rule. As demonstrated herein, the Ohio Supreme Court erred in creating such a bright line test. Furthermore, the trial court's factual determination that Robinette's consent was voluntary and not the result of an illegal seizure must stand.

B. The Fourth Amendment Prohibition Against Unreasonable Searches And Seizures Has No Application To Consensual Encounters Between Police Officers And Citizens.

Mere questioning of an individual does not constitute a seizure, and even when an officer has no basis for suspecting a person of anything, he may generally approach and ask questions of the person, ask to examine the person's identification and request consent to search his or her luggage, as long as the police do not convey a message that compliance is required. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991). Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a

criminal prosecution his voluntary answers to such questions. *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324 (1983). If Robert Robinette voluntarily answered questions and allowed the search, there was no Fourth Amendment violation at all and the evidence is not subject to suppression.

C. The Totality Of The Circumstances Test Is The Appropriate Standard By Which To Measure Whether An Encounter Between A Police Officer And A Citizen Is A Seizure And Whether The Citizen's Cooperation With The Officer Is Voluntary.

1. This Court Has Refused To Apply Bright-Line Tests Or Per Se Rules To Determine Whether Any Encounter Between A Police Officer And A Citizen Is Consensual In Nature Or Is A Detention Which Must Be Supported By Objective Justification.

In *United States v. Mendenhall*, 466 U.S. 544, 100 S.Ct.1870 (1980), this Court held that a person has been seized within the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave. In endorsing the totality of the circumstances test, the Court found that the fact that the citizen was not told by the government agents that she need not cooperate did not necessarily mean that cooperation was involuntary. Since the decision in *Mendenhall*, this Court has

rejected every attempt to replace the totality of the circumstances standard with *per se* rules or bright-line tests.

In at least three instances since the decision in *Mendenhall*, this Court has rejected the idea that a *per se* or bright-line test should replace the totality of the circumstances test. In *Michigan v. Chesternut*, 486 U.S. 567, 572, 108 S.Ct. 1975, 1979 (1988), the Court declined the invitation to apply a bright-line test to determine whether an investigatory pursuit was a seizure:

> Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.

Again, in *Florida v. Bostick*, *supra*, at 439, 2382, the Court again forcefully rejected a *per se* rule created by the Florida Supreme Court presuming that every encounter between a police officer and a citizen occurring on a bus was a seizure:

> We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all of the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus. The Florida Supreme Court erred in adopting a *per se* rule.

And in *Florida v. Royer*, 460 U.S. 491, 506 103 S.Ct. 1319, 1329 (1983), a plurality opinion, Justice White rejected the idea that a bright line could be drawn to separate consensual encounters from Fourth Amendment seizures:

> We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

Thus, it is evident that after announcing the totality of the circumstances test in *United States v. Mendenhall, supra*, this Court has never countenanced the substitution of a bright-line test for the totality of the circumstances standard.

2. This Court Has Refused To Hold That A Citizen Must Be Warned That He Is Free To Leave Or To Refuse To Cooperate As A Necessary Condition Of A Consensual Encounter.

This Court has consistently refused to hold that the giving of cautionary warnings is a defining characteristic

of a consensual encounter or of voluntary cooperation. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973):

> [T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.

This view was echoed in *United States v. Mendenhall, supra*, at 555, 1878 where it was specifically observed that the voluntariness of Ms. Mendenhall's responses to the DEA agents who approached her in the airport did not depend upon her having been told that she did not have to cooperate. Similarly in *I.N.S. v. Delgado*, 466 U.S. 209, 216, 104 S. Ct. 1758, 1762 (1984), it was observed that:

> While most citizens will respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, hardly eliminates the consensual nature of the response.

Nor does the requirement that an officer provide prophylactic warnings to a suspect in a custodial interrogation require that similar warnings be given and rights explicitly waived in the context of the Fourth Amendment. This argument was rejected in *Schneckloth v. Bustamonte*. Requiring the officer to give prophylactic warnings to a suspect about his constitutional rights prior to custodial interrogation and holding the state to a high

standard of proof of waiver of those rights were necessary to protect the fairness of the trial. In contrast, the protections of the Fourth Amendment have nothing to do with the fair ascertainment of truth at a criminal trial. Instead, the Fourth Amendment protects the security of one's privacy against arbitrary intrusion by the police. Thus, there is no likelihood of unreliability present in a search and seizure case, and it is not necessary to prove that the person who consented to a search knew of his right to refuse in order to protect the integrity of the fact finding process. *Id.*

As shown, this Court has always refused to hold that an officer must always advise a citizen that he need not cooperate in order to find that the encounter between the citizen and the officer was consensual.

3. The Totality Of The Circumstances Test, Which Looks To Context And Reasonableness And Which Has Always Been Applied To Distinguish Consensual Encounters Between Police Officers And Citizens From Those Which Are Non-Consensual, Requires That Appropriate Weight Be Accorded To All Of The Circumstances Presented In Any Such Encounter, And Is Sufficiently Flexible And Sensitive To Allow Appropriate Weight To Be Accorded To The Peculiar Characteristics Of Any Kind Of Police Citizen Encounter.

Emerging from the cases decided by this Court in the last 20 years is the principle that the totality of the

circumstances test, based as it is on context and reasonableness, is uniquely capable of distinguishing police detention from a consensual encounter and voluntary consent from coerced cooperation. This Court has repeatedly found that the traditional test is sufficiently flexible and sensitive to account for any aspect of a particular kind of encounter that might result in coerced cooperation. In *Florida v. Bostick, supra,* the concern was that the encounter occurred on a bus instead of a city street or airport, in *Michigan v. Chesternut, supra,* the concern was that it was an investigative pursuit and in *Schneckloth v. Bustamonte, supra,* the concern was the failure of the officer to alert the citizen that he could refuse consent to the search. Yet in each case this Court held that the totality of the circumstances must be applied to determine whether a seizure had occurred or consent was voluntary.

An explanation of the reasons that the traditional test is so well suited to the purpose appears in *Michigan v. Chesternut, supra,* at 573, 1979:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.

This opinion also contains the observation that, while the test is flexible enough to be applied to the entire range of police conduct in an equally broad range of settings, it must be consistently applied from one police encounter to

the next, regardless of the particular person's response to the actions of the police:

> The test's objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. . . . This "reasonable person" standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached. *Id.* 574, 1979 (Interior citation omitted)

In this case the Ohio Supreme Court was concerned that the peculiar nature of traffic stops made citizens more vulnerable to police coercion:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle they are not legally obligated to allow.

State v. Robinette, supra, 654. But the Ohio court overlooked the fact that this Court addressed the concern that some encounters were more conducive to coercion than others in *Schneckloth v. Bustamonte, supra* at 229, 2049:

> In examining all the circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. The searches that are the product of police coercion can thus be filtered out without undermining

> the continuing validity of consent searches. In sum there is no reason for us to depart in the area of consent searches, from the traditional definition of voluntariness.

The Ohio Supreme Court failed to heed what this Court has taught – that the totality of the circumstances test is sufficiently sensitive and flexible to filter out those situations where the consent of the citizen is not voluntary. The unreasonableness of applying a bright-line test is illustrated by the outcome of this case. The defendant, who was 38 years old and had a college degree, testified that he believed he was free to go when the officer gave him back his license and registration. The encounter was filmed and the film admitted into evidence. The trial court found the search to be voluntary based on the totality of the circumstances. Nevertheless, the Ohio Supreme Court held that consent was not voluntary because the officer had not told the defendant he was free to go. This result defies logic and law.

Requiring police officers to advise motorists that detention has ended as a prerequisite to a finding of voluntary cooperation suggests that citizens cannot be trusted to know that they need not answer an officer's question or allow a search. The Ohio Supreme Court has demonstrated that it has no confidence that a citizen who has just received a traffic ticket or warning will say to the police officer "No, sir, you cannot search my car", or "Officer, you've given me my ticket, and I'm not going to stand here and answer any more of your questions." But in fact citizens frequently tell police officers just that, and refuse to answer questions and decline to allow a search of their cars. Furthermore, ordering police officers to

inform motorists that the legal detention is over betrays a belief that police officers, left to their own devices, will not honor the Fourth Amendment. But the videotape of the encounter between the officer and the citizen in this case shows that it is wrong to assume that police officers will coerce cooperation – there is nothing coercive in Officer Newsome's words or his conduct. Finally, by creating a bright-line rule the Ohio Supreme Court demonstrates that it does not trust trial judges to do what this Court has directed trial judges to do – to weigh the factors and circumstances to determine whether cooperation was in fact voluntary. But the decision of the trial court in this case is an illustration of how well the totality of the circumstances test works – in finding the consent to search voluntary, the trial judge observed that his initial reservations about the nature of the encounter had been overcome by seeing the interaction of the officer and the citizen on the videotape, and that based on what he saw in the videotape and the defendant's intelligence and education, consent was valid.

CONCLUSION

Whether or not an encounter between a police officer and a citizen is consensual must be determined by the totality of the circumstances. Thus the Ohio Supreme Court erred in creating a bright-line test to be applied whenever a police officer asks a motorist questions after the detention for a lawful traffic stop has ended. The Ohio Supreme Court's decision creating this bright-line test should be reversed and the judgment of the trial court, which was based upon the factual finding that

Robinette was not seized when he consented to the search of his automobile and his consent was voluntary, should be reinstated.

Respectfully submitted,

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